

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT LAMAR MCINNIS,

Defendant and Appellant.

C086425

(Super. Ct. No. CRF173102)

Defendant Robert Lamar McInnis was convicted of possessing a deadly weapon. (Pen. Code, § 4574, subd. (a); statutory section references that follow are to the Penal Code.) Defendant's appointed counsel has filed an opening brief that sets forth the facts of the case and asks this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.)

In supplemental briefing, defendant contends: (1) the trial court improperly amended the complaint, (2) there was insufficient evidence to support his conviction, (3)

the trial court improperly denied his *Romero* motion to strike his strikes, (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497) and (4) he received ineffective assistance of counsel. We will order the trial court to modify the abstract of judgment to reflect the fees and fines imposed during sentencing but otherwise affirm the judgment.

FACTS AND PROCEEDINGS

On June 12, 2017, defendant was housed at Yolo County jail in cell No. 301. Defendant was on a “modified time out” exception to a 23-hour solitary segregation arrangement, whereby he would be escorted to booking for a one-hour period. He had been the sole occupant of the cell since March 2017. Other inmates were not allowed to enter defendant’s cell while he was in the booking area. That morning, he was escorted to booking at 6:15 a.m., with the assistance of Correctional Officer Louis Chelossi. Chelossi closed and secured the cell door behind defendant.

At 8:15 a.m., Chelossi arrived at defendant’s cell, which was closed and locked, and inspected and searched it. Chelossi found an inmate-made “shank” weapon inside a box of oatmeal on the desk, wrapped up in a piece of paper and hidden underneath letters. The letters had defendant’s name on them, as did a sticker attached to the bottom of the box. The weapon had a rusted metal tip and a screw on the other end and it was wrapped in tightly wound plastic small enough to slip under the crack of a door. At trial, Chelossi testified that there was rusted metal on the door frame of defendant’s cell and missing from the bottom door frame were bits of metal that were the size of the weapon tip. Paint on the weapon tip also matched the color of the paint on the door frame. It was “possibl[e]” that the screw was from an overhead lighting fixture in the cell, although Chelossi had not noticed any missing screws during the search. Photos were shown to the jury of the weapon and defendant’s cell door.

During the September 2017 trial, Chelossi testified that he had not observed defendant’s cell during defendant’s two-hour stay in booking, nor had he reviewed jail

surveillance video regarding the incident. There were no fingerprints nor DNA taken from the weapon, and Chelossi did not check defendant's hands for cuts. It was "common" for inmates to pass things to each other, such as food or letters, even though it was technically not allowed. There were searches performed of defendant's cell on May 26 and June 5, 2017. Although Chelossi was not asked whether any contraband was found during those searches, defense counsel argued during closing argument that the searches must have yielded nothing because otherwise the jury "would have heard about [it]."

Sheriff's Deputy Jeremy Hembree testified at trial that the shank found in defendant's cell was the "largest one" he had ever seen in the jail. In Hembree's opinion, the shank was dangerous and could kill or harm someone. Hembree testified his report misstated that the shank was found in cell No. 302, when it was actually cell No. 301. It appeared to Hembree that the metal tip of the shank had been sharpened.

Defendant initially told Hembree he had no contraband in his cell. When Hembree told defendant that officers had found the shank, defendant said he had found a rolled-up piece of paper in his cell under the toilet and, without looking inside, threw it in the oatmeal box. Hembree had not told defendant any details about the officers' discovery, including that the shank was found rolled up in a piece of paper. The interview was not recorded, and Hembree paraphrased defendant in his report. Hembree testified he did not notice any screw missing that day from the most likely source in defendant's cell, the overhead vent. Still, he "did not examine the entire cell" or the jail.

Correctional Lieutenant Drella Hunter testified at trial that defendant had been put on a safety protocol in June 2017, due to prior disciplinary incidents. Defendant flooded his cell on June 8, 2017. Hunter also testified there had been "a lot" of "gassing," namely when a person fills up a plastic bag with urine, feces, or both, and steps on it by the door so as to fling the substance at people. In addition to telling the jury to disregard Hunter's testimony regarding gassing, per the parties' agreement, the jury was instructed that they

were to consider any evidence alleging defendant broke the jail rules only for the purpose of explaining why defendant was moved within the jail.

Prior to the close of evidence, a surveillance video and other jail records were submitted to the jury by stipulation. During closing argument, defense counsel cited the records to argue that prior searches of defendant's cell had not yielded any contraband. He also argued it was unlikely defendant obtained anything dangerous because the records showed defendant was not often in his cell, had limited access to his belongings, and was being closely watched by the guards, especially since he was on suicide (or safety) watch between June 8 and 12, 2017.

A jury found defendant guilty of possession of a deadly weapon in jail. (§ 4574, subd. (a).)

The trial court subsequently held separate proceedings regarding enhancements for two prior strikes and a prior prison term. (§§ 667, subds. (b)-(i), 667.5, subd. (b).) During the hearing, defense counsel stated he was not aware the prosecutor had already provided a copy of the documents that would be used to prove the enhancements. The trial court asked defense counsel if he needed additional time to prepare. Defense counsel stated there had been a "pattern of late discovery" in the trial, which he had tried to accommodate. Still, the late discovery may have prevented counsel from his "best efforts," and he requested the trial court exclude the evidence. The prosecutor responded he had provided discovery in a timely fashion and done his best to expedite any defense requests for additional documents. The trial court denied defense counsel's motion to exclude. Defense counsel conferred with defendant and informed the court that he would proceed. After considering the evidence, the trial court found the alleged enhancements to be true.

Prior to sentencing, defendant moved to strike his prior strikes and prior prison term enhancement pursuant to section 1385 and *Romero*. According to defendant, he had

a history of mental health problems and would receive a lengthy sentence regardless of whether the enhancements were imposed.

In December 2017, defendant moved for new counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. During the hearing, defendant said he wanted a new trial and a new attorney because the discovery was late, the jail required him to discuss his case with his attorney around other inmates and jail staff, and his attorney did not present evidence or witnesses that he suggested. He also argued his attorney prevented him from testifying, and that his attorney was unable to focus on his case due to a death in the family. Defense counsel noted he had objected to the timeliness of the prosecution's discovery and had decided to proceed with trial despite the death of his father-in-law because defendant would not waive time. The trial court denied defendant's motion, reasoning there was no evidence defense counsel was unqualified or had practiced in a way that was below the standard expected of a defense attorney in a similar case. In addition, the trial court had delayed the trial by a week due to the death of defense counsel's father-in-law.

The trial court also denied defendant's *Romero* motion, reasoning defendant's mental health issues "d[id not] take things outside of" the Three Strikes law.

The trial court proceeded to sentence defendant to state prison for an aggregate term of seven years, as follows: three years for the possession of a deadly weapon in jail, (§ 4574) doubled to six years due to the strike (§ 667, subd. (e)), plus one year for the prior prison term enhancement (§ 667.5, subd. (b)). The court imposed a \$300 restitution fine (§ 1202.4, subd. (b)), a corresponding \$300 parole revocation fine, suspended unless parole is revoked (§ 1202.45), a \$30 collection fee (§ 1203.1, subd. (l)), a \$40 court security fee (§ 1465.8), and a \$30 conviction assessment fee (Gov. Code, § 70373). The trial court awarded 373 total days of custody credit. The collection fee is not listed in the abstract of judgment.

DISCUSSION

I

The Amended Information

Appointed counsel filed an opening brief that sets forth the facts of the case and asks us to determine whether there are any arguable issues on appeal. (*People v. Wende, supra*, 25 Cal.3d 436.) In supplemental briefing defendant argues the trial court erred in amending the information to reflect that the shank was found in cell No. 301, rather than cell No. 302. Defendant does not tell us why this amendment was error except to the extent that the complaint was amended after the last day to file motions prior to the jury trial.

We note that the complaint that appears in the clerk's transcript of trial was never amended and that the complaint and the information each allege only that defendant brought a deadly weapon into the "Yolo County Jail,"

To the extent his assertion of error is based upon due process lack of notice grounds, we find defendant's contention without merit because the allegations in the complaint were sufficient to identify the act with which he was charged.

II

Sufficiency of the Evidence

Defendant argues there was insufficient evidence to support his conviction for possession of a deadly weapon while in jail. Defendant points to Deputy Hembree's testimony that he did not notice any screw missing that day from the overhead vent in defendant's cell, which was the most likely source. In addition, according to defendant, there was no evidence of any marks in his cell to show anything was sharpened, nor were there any cuts on defendant's hands. Although the metal shank matched the metal from his cell's doorframe, this was common to most of the cells in the housing unit. There

were no fingerprints or DNA evidence linking the shank to him. Defendant further argues that prior searches had found no contraband, and he was on safety watch for one week and had limited access to his cell and belongings.

“ ‘When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence--that is, evidence that is reasonable, credible, and of solid value--from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.] We determine ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ [Citation.] In so doing, a reviewing court ‘presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citation.]” (*People v. Avila* (2009) 46 Cal.4th 680, 701.) A reviewing court does not reweigh evidence or reevaluate a witness’s credibility. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

Despite defendant’s limited access to his cell and belongings prior to the search, at 6:15 a.m. on June 12, he was removed from his cell and the door was closed behind him. Defendant was the sole occupant of the cell, and no other inmates were allowed to enter it while he was in the booking area. The cell was locked when Correctional Officer Chelossi arrived two hours later and found the shank. A jury could reasonably infer that the shank was defendant’s, especially since it was hidden in a box with a sticker with defendant’s name on it, inside a rolled up piece of paper and buried beneath letters with defendant’s name on them. Moreover, defendant told Deputy Hembree he had found a rolled up piece of paper in his cell under the toilet and threw it in the oatmeal box. In sum, substantial evidence supports the jury verdict.

III

The Romero Motion

Defendant argues the trial court improperly denied his *Romero* motion. According to defendant, the enhancements should have been stricken because his crime was neither violent nor serious. Defendant also argues Senate Bill No. 1393, which effectively removes the restriction on a trial court's ability to strike section 667, subdivision (a) prior serious felony enhancements (Stats. 2018, ch. 1013, §§ 1-2), should apply. We disagree.

In deciding whether to dismiss a prior strike conviction allegation pursuant to *Romero* and section 1385, a trial court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes law's] spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) The circumstances establishing that the defendant falls outside the spirit of the three strikes scheme must be extraordinary. (*People v. Carmony* (2004) 33 Cal.4th 367, 378.) Reversal is justified where the trial court was unaware of its discretion to dismiss a prior strike or considered impermissible factors in declining to dismiss. (*Ibid.*)

We find no abuse of discretion. In considering defendant's motion, the trial court was aware of its discretion, considered the relevant factors, and reached its decision in conformity with the spirit of the Three Strikes law. The decision was neither irrational nor arbitrary. Moreover, Senate Bill No. 1393 is inapplicable, since it is limited to section 667, subdivision (a) enhancements, and defendant was sentenced pursuant to section 667, subdivision (e) and section 667.5, subdivision (b).

IV

Ineffective Assistance of Counsel

Finally, defendant notes his counsel complained about the jail requiring him to confer with his lawyer near jail staff and other inmates. He also argues his lawyer was not able to properly defend him due to a death in the family and delayed discovery from the prosecution. To the extent defendant is contending he received ineffective assistance of counsel, we find his contentions without merit.

To establish his claim, defendant must show that counsel's performance was "deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) He must also show "resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different." (*Ibid.*)

Even if defendant could show that his counsel's performance was deficient, he has failed to show prejudice. Given that defendant was the sole occupant of the cell in which the shank was found, and that the shank was hidden inside and underneath items with defendant's name on them, it is not reasonably probable that the outcome of the proceeding would have been different.

V

The Abstract of Judgment

As previously noted, the abstract of judgment fails to include the \$30 collection fee imposed by the trial court during sentencing. We shall order the omission corrected. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [an abstract of judgment must reflect the trial court's oral judgment].)

We have undertaken an examination of the entire record and find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The trial court is directed to prepare an amended abstract of judgment in accordance with this opinion and to forward a certified copy to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

HULL, Acting P. J.

We concur:

MURRAY, J.

HOCH, J.